

# EXHIBIT 1

# UNITED STATES INTERNATIONAL TRADE COMMISSION

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In the Matter of:	)	
	)	
CERTAIN EQUIPMENT	)	
FOR TELECOMMUNICATIONS	)	Investigation No.:
OR DATA COMMUNICATIONS	)	337-TA-574
NETWORKS, INCLUDING	)	
ROUTERS, SWITCHES AND	)	
HUBS, AND COMPONENTS	)	
THEREOF	)	

Pages: 1 through 51

Place: Washington, D.C.

Date: August 16, 2006

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1                                 P R O C E E D I N G S

2 (2:00 p.m.)

3 JUDGE HARRIS: This is the preliminary  
4 conference in the matter of Certain Equipment for  
5 Telecommunications or Data Communications Networks  
6 Including Routers, Switches and Hubs, and Components  
7 Thereof, United States International Trade Commission  
8 Investigation No. 337-TA-574.

9                   See some familiar faces here. The  
10 preliminary conference is used to bring up any matters  
11 which any counsel feels might either block the  
12 orderly, smooth processing of the case or something  
13 that might contribute to making it go faster and  
14 smoother and also to set the schedule for the rest of  
15 the case. Why don't we have the notices of  
16 appearance.

17 For the Complainant?

18 MR. BRITTINGHAM: Your Honor, this is Smith  
19 Brittingham with Finnegan, Henderson, Farabow, Garrett  
20 & Dunner for Complainant, Telcordia Technologies. I'm  
21 here with Steve Anzalone and John Williamson, also  
22 from my firm.

23 JUDGE HARRIS: All right. For Respondents?

24 MS. SUNDEEN: Your Honor, I'm Marcia Sundeen  
25 with Kenyon and Kenyon. I'm here on behalf of Alcatel

1 SA and Alcatel USA.

2 JUDGE HARRIS: All right.

3 MR. SINDER: Your Honor, Stuart Sinder, also  
4 with Kenyon and Kenyon on behalf of Alcatel USA and  
5 Alcatel SA, and with us today from Alcatel are Mr.  
6 John Berres and Mr. T. Tom Gellenthien.

7 JUDGE HARRIS: All right.

8 MR. CHERNY: Your Honor, Steve Cherny from  
9 Latham & Watkins representing Lucent Technologies.  
10 With me here are Max Grant, who is another lawyer from  
11 Latham & Watkins, as well as Elaine Drager, who is a  
12 lawyer for Lucent Technologies.

13 MR. REINES: Good afternoon, Your Honor. My  
14 name is Edward Reines from the law firm of Weil,  
15 Gotshal on behalf of Cisco Systems, and with me for  
16 Cisco is Sonal Metha, and David Hickerson and Joanne  
17 Guerrera.

18 JUDGE HARRIS: All right. For the staff?

19 MR. BRITTINGHAM: One more, Your Honor.

20 JUDGE HARRIS: All right. I didn't mean to  
21 leave you out.

22 MR. OTTESON: No problem. James Otteson,  
23 Wilson, Sonsini, Goodrich and Rosati for Respondent --

24 JUDGE HARRIS: Mr. Otteson. I can't see too  
25 well going back that far.

1 MR. OTTESON: -- PMC Sierra, and I'm joined  
2 by my colleague, Nathan Walker.

3 JUDGE HARRIS: For the staff?

4 MR. PEDERSEN: Good afternoon, Your Honor.  
5 Steve Pedersen on behalf of the staff. With me today  
6 is Mr. Spence Chubb.

7 JUDGE HARRIS: Well, one thing I noticed in  
8 reading through the discovery statements is that  
9 there's a trial in this matter scheduled for I believe  
10 it was April 14 in the District of Delaware and since  
11 the parties have all proposed a trial date of about  
12 March 17 I think it was I'm going to propose a trial  
13 date of March 28 because of the availability of  
14 courtrooms, but why are we really here?

15 Mr. Brittingham or Mr. Anzalone? I assume  
16 you've got most of your discovery or you're going to  
17 finish it up between now and then, and you've got a  
18 trial scheduled for just weeks after our trial would  
19 be scheduled.

20 MR. BRITTINGHAM: Your Honor, first let me  
21 just clear up the date of the trial in the District  
22 Court right now is April 16.

23 JUDGE HARRIS: April 16. Okay.

24 MR. BRITTINGHAM: We had originally proposed  
25 with the other parties March 7, so there would have



1 been some fairly distinct separation there. One other  
2 aspect, and I'll let Mr. Anzalone explain a little  
3 more if necessary, we do have one party, Alcatel, who  
4 has obtained a stay of the proceedings against them in  
5 the District Court and as a result --

6 JUDGE HARRIS: Could you move your  
7 microphone a little closer? Is it on?

8 MR. BRITTINGHAM: Alcatel, the party Ms.  
9 Sundeen is representing, is a party in the District  
10 Court case, but has obtained a stay of the proceedings  
11 against them in the District Court once this case was  
12 filed.

13 JUDGE HARRIS: That was because of lack of  
14 personal jurisdiction?

15 MR. BRITTINGHAM: No. There are two Alcatel  
16 entities that were originally named in the District  
17 Court proceeding. One of them was Alcatel SA, the  
18 French company, and the other was Alcatel USA, an  
19 American corporation subsidiary, and Alcatel USA is  
20 still a party to the District Court. It was only the  
21 French parent that was dismissed for lack of personal  
22 jurisdiction.

23 That happened some time ago. More recently  
24 however when this case was instituted Alcatel USA  
25 moved to stay pursuant to 28 U.S.C. 1659 as is their

1 right for a stay of the District Court proceedings, so  
2 the trial that we're talking about that would go  
3 forward on April 16 would only be against Cisco and  
4 Lucent at this point. So one of the parties at a  
5 minimum is not involved in that trial.

6 JUDGE HARRIS: Now, what was the --

7 MR. BRITTINGHAM: Also, PMC Sierra is not  
8 involved in the District Court case at all at this  
9 point other than having produced some documents as a  
10 third-party recipient of a subpoena.

11 JUDGE HARRIS: All right. Mr. Anzalone, did  
12 you want to comment, also?

13 MR. ANZALONE: Yes. Just a little bit  
14 further, Your Honor. Good afternoon. Without going  
15 into work product or privilege issues which I'm sure  
16 you wouldn't want me to do in terms of aspects of this  
17 case there were a range of settlement discussions,  
18 negotiations and mediations in this case with the  
19 Defendants that extended through the end of February  
20 and those were not successful.

21 With respect to why we're here obviously for  
22 an exclusion order. The Court may be familiar that in  
23 District Court cases there was cert granted by the  
24 Supreme Court in Merck v. ebay.

25 In November of last year the Supreme Court

1 came down with a decision I think the day after this  
2 suit was filed indicating that the Federal Circuit  
3 decisions indicating injunctions in District Court  
4 would be granted as a matter of due course was no  
5 longer valid, so that explains some of the reasoning  
6 without, again, why any Complainant would file in the  
7 ITC without getting into work product issues or  
8 attorney/client privilege.

9 JUDGE HARRIS: So is that why we're getting  
10 so many cases here?

11 MR. ANZALONE: That and the typical reasons,  
12 Your Honor, people file suit in the ITC. That's  
13 correct.

14 JUDGE HARRIS: All right. What's on your  
15 agenda to bring up, Mr. Brittingham?

16 MR. BRITTINGHAM: Your Honor, we're  
17 essentially really just the procedural schedule.  
18 There are a few pending motions that I believe the  
19 motion that Alcatel SA filed, there's been briefing on  
20 it. As far as we're concerned I figure it's ripe for  
21 a decision.

22 JUDGE HARRIS: Now, that's the French  
23 company?

24 MR. BRITTINGHAM: That's the French company.  
25 We also have a pending motion to compel discovery from

1 that entity as well. I don't believe the response  
2 date is up yet or at least I know we haven't received  
3 a response, so I'm not sure that's ripe, but again, I  
4 think those issues essentially go hand in hand anyway.  
5 We believe they ought to be in the case, we believe  
6 they're a proper party and we believe they ought to  
7 respond to discovery, but that's in our papers.

8           Discovery has begun. As you're probably  
9 aware there was a lot of discovery in the District  
10 Court proceeding. There are some additional --

11           JUDGE HARRIS: That proceeding is live  
12 against Cisco and Lucent?

13           MR. BRITTINGHAM: That is correct, although  
14 discovery was essentially completed or at least the  
15 period for discovery was completed. We're in the  
16 midst of just finishing up expert depositions right  
17 now in the District Court, so fact discovery, I  
18 believe the Judge has closed that, but we got a lot of  
19 it from all the parties who were involved at that time  
20 even before the stay.

21           The parties are engaging right now in  
22 discovery efforts and there have been efforts to  
23 either object or complain about the other side's  
24 objections. Those we have not yet resolved, but I'm  
25 not sure they're ripe for discussion yet.

1 JUDGE HARRIS: Now, is there an agreement  
2 that the discovery in the District Court case would  
3 all be used here as well?

4 MR. BRITTINGHAM: I'm not sure I'd call it  
5 an agreement because nobody has put paper to pen and  
6 actually written something, but it's my understanding  
7 that all the parties are basically of the view that  
8 the discovery that has been exchanged in the District  
9 Court can be used in this proceeding. Certainly that  
10 appears to be the way each party is treating that  
11 prior production, and I think obviously that makes  
12 sense and is most efficient.

13 There are a few minor issues of  
14 confidentiality concerns that were outstanding in the  
15 District Court case that have not yet been resolved.  
16 I bring it up only because maybe we'll resolve them.  
17 Telcordia has documents that various companies submit  
18 to them under some testing programs that are submitted  
19 in confidence and those have been the subject of some  
20 discovery requests.

21 We have produced documents that Cisco for  
22 example provided us in discovery to Cisco. We did not  
23 produce those documents to Alcatel or Lucent. We've  
24 produced the documents that Lucent gave to Telcordia  
25 back to Lucent, but we haven't given those to Cisco or

1 Alcatel.

2           Now, that was feasible in the District Court  
3 case because those were technically three separate  
4 cases. This is one investigation one would ordinarily  
5 produce all documents to all parties. What we would  
6 like to know is whether Alcatel wants the documents  
7 that relate only to the Cisco products and whether  
8 Cisco would waive any confidentiality provision that  
9 would have applied to their original submission of  
10 those documents to us.

11           So that's a minor issue. I'm not even sure  
12 whether the Respondents care.

13           JUDGE HARRIS: Well, have you taken that up  
14 with opposing counsel?

15           MR. BRITTINGHAM: I did raise that in an  
16 email some time ago. I haven't gotten any response.  
17 We haven't gotten quite that far. As far as I know  
18 right now I'm not sure that they care enough to work  
19 it out. I mean, that it's important to them to get  
20 those other documents that they haven't had thus far.  
21 So other than that I don't think there's any  
22 impediment --

23           JUDGE HARRIS: Well, does any Respondents'  
24 counsel have any interest in the issue that Mr.  
25 Brittingham is just discussing?

1 MR. REINES: Thank you, Your Honor. The  
2 Respondents have a good working relationship among  
3 each other and I'm sure we can work that out. I  
4 really doubt that's going to be of any significance.  
5 We can exchange each other's information as  
6 appropriate, and I just don't see that to be an issue  
7 that needs to consume the Court's time.

8 MR. BRITTINGHAM: Your Honor, our sense was  
9 that this was not a problem for them because we had at  
10 least some belief that maybe they were exchanging  
11 their own documents among themselves anyway, but I  
12 raised it only because that was one thing that  
13 Telcordia was maintaining as a reason not to produce  
14 certain documents to certain parties.

15 The flip side of the coin is whether  
16 documents in this proceeding could be used in the  
17 District Court proceeding. As to Alcatel I think  
18 that's kind of an automatic because once the stay is  
19 lifted the record in this case is available to the  
20 District Court. Cisco and Lucent I believe have  
21 objected to any use of documents produced in the ITC  
22 in the District Court.

23 I'm not sure we need to resolve that right  
24 now. It would seem to be easiest to just ensure that  
25 neither protective order prohibits use in the other

1 proceeding assuming the Judge in the other proceeding  
2 believes that information is appropriate and  
3 admissible.

4 JUDGE HARRIS: Well, it sounds to me like  
5 that would be the District Court Judge's problem.

6 MR. BRITTINGHAM: Well, our position would  
7 be yes. The District Court Judge is obviously the  
8 ruler of what comes in and what doesn't come in in the  
9 District Court just as you are in charge of what comes  
10 in here, what doesn't, but if there's no cross-use  
11 agreement then it's not the Judge that's making that  
12 determination it's merely the presence of an ITC  
13 protective order that prohibits use of documents in  
14 another proceeding.

15 JUDGE HARRIS: Well, if you want a cross-use  
16 in a broad sense in which you're talking about it I  
17 suggest you first try to negotiate it with opposing  
18 counsel. Now, while everybody is here --

19 MR. BRITTINGHAM: I believe we did propose  
20 that and their position as I understand it is that  
21 documents produced in the District Court can be used  
22 in the ITC, but not the other way around.

23 Now, our position just to make it clear is  
24 that documents produced in the ITC may or may not be  
25 admissible in the District Court depending on whether



1 the District Court Judge believes they ought to be  
2 admitted, believes they are produced late or whatever,  
3 but that should not be determined simply by the ITC  
4 protective order.

5 Right now we can't even present those  
6 documents to the District Court and say please let us  
7 use these because we're prohibited by the terms of the  
8 ITC protective order from doing that.

9 JUDGE HARRIS: Well, are you? I mean, if  
10 you tell the District Court Judge that there are X  
11 number of documents here on the general subject matter  
12 of this produced by the Defendants I don't see how you  
13 would be breaching the protective order in doing that.

14 MR. BRITTINGHAM: No. You're right. If it  
15 were only just informing the Judge of the existence of  
16 documents I think that would be --

17 JUDGE HARRIS: Then if he considers those  
18 relevant to the District Court proceedings he would  
19 make that determination or work out some way if he  
20 thought it was important enough to see that they came  
21 into evidence in that proceeding. I mean, sometimes I  
22 can try to knock heads together, but I don't see that  
23 I should do it for another proceeding.

24 MR. BRITTINGHAM: No, Your Honor, and we're  
25 probably speaking hypothetically here anyway because

1 at this point we don't have any documents that we  
2 think we'd want to use in one proceeding that we can't  
3 and we can cross that bridge when we come to it.

4 JUDGE HARRIS: All right. Ms. Sundeen, is  
5 there any matters that you wanted to bring up that --

6 MR. SINDER: Your Honor, Stuart Sinder on  
7 behalf of Alcatel. On behalf of Alcatel I don't  
8 believe that there are any unique matters that we need  
9 to address. I think there are --

10 JUDGE HARRIS: Now, let's see. I don't have  
11 the distinction straight. You're representing the  
12 French company only?

13 MR. SINDER: The French company and the U.S.  
14 company. Both.

15 JUDGE HARRIS: And the U.S. company. So  
16 when you say on behalf of Alcatel are you --

17 MR. SINDER: I'm referring to both Alcatel  
18 entities that are Respondents in this proceeding.

19 JUDGE HARRIS: Okay.

20 MR. SINDER: We have in the answer to the  
21 complaint on behalf of the French company and also in  
22 our motion for a summary determination that the  
23 investigation should be terminated with respect to the  
24 French company indicated that by doing so we're  
25 reserving all of our rights to object to personal

1 jurisdiction on behalf of the French company.

2 That would be true for our appearance here  
3 today that --

4 JUDGE HARRIS: Now, the French company  
5 doesn't make any products or sell any products?

6 MR. SINDER: That's correct.

7 JUDGE HARRIS: What does it do?

8 MR. SINDER: The French company is really,  
9 it's just a holding company which has directly or  
10 indirectly literally hundreds of operating  
11 subsidiaries around the world. It's not an operating  
12 company at all. Among those subsidiaries are Alcatel  
13 USA, which is also a Respondent here, and that's the  
14 company that is in effect the sales arm in the United  
15 States, so they're the company that is selling all of  
16 the accused products.

17 There are other Alcatel entities which well-  
18 known to the Complainant manufacture the accused  
19 products, but they didn't even bother to join them as  
20 respondents, so it's clear that they don't really need  
21 all of the companies that have a direct connection  
22 with or involvement in manufacture, or importation, or  
23 sale of the accused products.

24 They have the one company that they believe  
25 they need in order to get effective relief if they

1 ultimately are found to be entitled to it and that's  
2 Alcatel USA, which is also a Respondent. Now, there  
3 are some scheduling issues which result from the co-  
4 pendency of the Court case, but since Alcatel took  
5 their -- it's only Alcatel USA which is a party to the  
6 District Court case.

7 Alcatel SA was dismissed in a decision by  
8 Judge Sleet for lack of personal jurisdiction, but  
9 Alcatel USA took a stay under their right to do so and  
10 therefore the scheduling issues relating to that  
11 proceeding only really relate to Cisco and Lucent, and  
12 I'd let my colleagues address those issues.

13 JUDGE HARRIS: Yes. Now, your summary  
14 determination motion, does that go to both Alcatel?

15 MR. SINDER: No. It only goes to the French  
16 parent because that company has no involvement in any  
17 way in the --

18 JUDGE HARRIS: What is it based on, your  
19 summary determination motion?

20 MR. SINDER: It's based on the fact that  
21 there is no disputed issue of fact with respect to the  
22 lack of any involvement by the French company, Alcatel  
23 SA, in the manufacture or sale for importation,  
24 importation or sale after importation of the products.  
25 It doesn't manufacture anything, it doesn't sell

1 anything, it just sort of owns stock in various  
2 subsidiaries.

3 This issue was litigated in front of the  
4 District Court Judge admittedly on we believe very  
5 related, but somewhat different issue of personal  
6 jurisdiction, but the underlying factual premises  
7 overlap considerably.

8 After a full briefing and argument on that  
9 the District Court rendered a decision which was  
10 attached to our summary determination motion finding  
11 that the French company didn't make anything, and  
12 didn't sell anything, had no involvement with the  
13 accused products, had lack of any operating activity  
14 in the U.S. and based on that founded that the  
15 Delaware Court lacked personal jurisdiction.

16 The underlying factual determinations that  
17 were made there are the same factual determinations  
18 which would make a proceeding against the French  
19 company inappropriate here and should not really be  
20 named as a Respondent because it has no involvement  
21 with the accused products in any manner.

22 JUDGE HARRIS: Now, Mr. Brittingham, you  
23 filed a response to that summary determination motion.  
24 What is the --

25 MR. BRITTINGHAM: Yes.

1 JUDGE HARRIS: -- basis of your response?

2 MR. BRITTINGHAM: We have filed a response.

3 The basis is that Alcatel SA is the parent and over  
4 arching sort of ruler of the Alcatel network of  
5 companies and in our view is the very appropriate  
6 respondent for a number of reasons not the least of  
7 which is that they appear to be capable of directing  
8 the activities of the subsidiaries that actually carry  
9 out many of the functions.

10 Now, we disagree that there are no disputed  
11 issues of fact. I mean, frankly we would love to be  
12 able to present you with more facts that we believe  
13 would create a dispute, but Alcatel SA has flatly  
14 refused to answer any discovery so far, and so as a  
15 result we've relied solely on publicly available  
16 information on Alcatel's website, some of their  
17 securities filings, things of that nature that in our  
18 view present a different picture than what has just  
19 been presented to you and that is that the Alcatel  
20 board, although it's a five employee company there's  
21 an Alcatel board that is the overall management entity  
22 for the Alcatel group, which is group of as has been  
23 said over 100 companies, several of which are  
24 probably, certainly one or two Alcatel USA and there's  
25 also a subsidiary called Alcatel Canada that we know

1 of that are involved in these particular products.

2           There may be others. Alcatel SA does also  
3 finance research and development efforts for the  
4 entire Alcatel group. They handle intellectual  
5 property issues for the entire group. There's a large  
6 headquarters building that has a lot of people in it.  
7 I don't know which of the Alcatel companies they work  
8 for.

9           JUDGE HARRIS: Okay.

10           MR. BRITTINGHAM: We understand there's an  
11 Alcatel North America, which is not an actual  
12 incorporated entity, it's just an internal Alcatel  
13 business organization of some sort. So it's a big,  
14 huge company with 58,000 employees and we don't know  
15 exactly how they do their business.

16           JUDGE HARRIS: All right.

17           MR. BRITTINGHAM: That's why we have the  
18 parent as an actual respondent.

19           JUDGE HARRIS: Mr. Pedersen, has the staff  
20 filed a response on this?

21           MR. PEDERSEN: Yes, Your Honor. The staff  
22 did file a response and we took the position of not  
23 supporting the motion.

24           JUDGE HARRIS: On the grounds that not  
25 enough facts are available?

1 MR. PEDERSEN: On multiple grounds. First  
2 is that it appears to be that the Commission precedent  
3 of other investigations, there's substantial precedent  
4 that states that holding companies are indeed proper  
5 respondents. The staff noted in their responsive  
6 papers that there could be certain discovery issues  
7 that may present itself as the investigation proceeds  
8 and as Your Honor is well aware that it's always  
9 easier to take discovery before an entity if they are  
10 indeed a named respondent in an investigation.

11 There are means to do so if they are not,  
12 but they are generally more problematic. The staff  
13 also noted that certain senior executive board members  
14 are of both entities do overlap so that at this time  
15 it's hard to tell what type of control Alcatel SA has  
16 over Alcatel USA.

17 We also noted that it's very early in  
18 investigation and if discovery should prove that  
19 Alcatel SA does not import or have any control over  
20 Alcatel USA that they can refile their motion at a  
21 later time.

22 JUDGE HARRIS: All right. I'm sorry. I  
23 don't remember your name.

24 MR. SINDER: Stuart Sinder.

25 MR. CHERNY: Are you pointing to him or me?



1 JUDGE HARRIS: You.

2 MR. CHERNY: Steve Cherny from Latham &  
3 Watkins on behalf of Lucent Technologies.

4 JUDGE HARRIS: Yes. What would you like to  
5 take up?

6 MR. CHERNY: My schedule is very easy right  
7 now. I defer to Mr. Reines from Cisco. The issue  
8 that I believe he's going to be addressing is  
9 scheduling issues relating to the District Court  
10 litigation and this proceeding and those issues are in  
11 common, so we thought it made sense to have one person  
12 address in the first instance.

13 JUDGE HARRIS: Okay.

14 MR. REINES: Thank you, Your Honor. Ed  
15 Reines. If I'm not speaking loudly enough please let  
16 me know.

17 JUDGE HARRIS: That was good.

18 MR. REINES: Okay. Very good.

19 JUDGE HARRIS: When you said the word loudly  
20 that came across.

21 MR. REINES: All right. Well, yes, feel  
22 free to let me know.

23 JUDGE HARRIS: All right.

24 MR. REINES: From your initial comments  
25 there's two issues that you raised and I'd like to

1 address them each. One is why are we here, and the  
2 second one is reactions to the schedule which we  
3 received this afternoon from Your Honor. On the why  
4 we're here question that's a question that the  
5 District Court asked and a question we've asked.

6           There's two patents in this case. One is  
7 the 633 and one is the 763. With respect to at least  
8 the 763 there's not really any logic to this  
9 proceeding that we can see. It doesn't involve PMC  
10 Sierra, it doesn't involve Alcatel. So the argument  
11 which was the primary argument that we heard that we  
12 needed to have this action to group and capture these  
13 other parties, that doesn't apply to the 763 portion  
14 of this investigation.

15           The second point is that there's been no  
16 identification of relief that can't be obtained in the  
17 District Court. What's important on the 763 is that  
18 patent actually expires because it's so old -- this is  
19 a patent that's from 80s technology -- it expires a  
20 year from February. So it would be almost impossible  
21 for the Commission to provide any meaningful relief on  
22 it.

23           JUDGE HARRIS: It expires in February 2007?

24           MR. REINES: February 2008.

25           JUDGE HARRIS: 2008. All right.

1 MR. REINES: Okay? A year from this coming  
2 February. So it really doesn't seem to make any  
3 logic. From where we sit this filing followed on the  
4 heels of the claim construction hearing in the  
5 District Court which went very unfavorably to  
6 Telcordia by all accounts and that's why they dropped  
7 half of this investigation before even today.

8 So I think it was the reaction to the  
9 District Court that really led to the filing here, but  
10 it really doesn't make sense. Now, that's important  
11 on the second issue that you raised which is our  
12 primary work here today, the schedule. We agreed --  
13 by we, the Respondents as a group -- because our  
14 philosophy is a committed philosophy of a cooperative  
15 relationship with the other side and amongst each  
16 other to streamline this event.

17 JUDGE HARRIS: Streamline what?

18 MR. REINES: Streamline this ITC proceeding.  
19 So we were given the parameter of a 15 month target  
20 date, and so we worked within that framework to be  
21 cooperative and to come to dates that were the best  
22 given that limitation. We noted in our discovery  
23 statement that we proposed actually an 18 month target  
24 date because of the unusual nature of this, okay?

25 Now, why is this unusual? First of all this

1 is unusual because the trial injunction that would  
2 issue in it is before any ITC exclusion order. So  
3 right away it's a different circumstance.

4           The other thing is that these patents have  
5 been around for so long and we did two years of  
6 District Court litigation, but the bottom line is that  
7 -- let me first state the benefit of the 18 month  
8 target date would be that rather than expecting  
9 counsel for everybody to be in one Court, your Court,  
10 trying a case and then within a week going to Delaware  
11 and trying the same case, that doesn't make sense.

12           I don't think you're going to find very many  
13 people that say it does make sense. I understand the  
14 boundary conditions, the limitations you have in terms  
15 of the courtroom, and the target dates and all that.  
16 We understand those fully, but this is a complicated  
17 case.

18           You've got four different Respondents.  
19 Cisco alone has 45 different products that are the  
20 routers and switches and then 17 different modules.  
21 Just Cisco. That doesn't include the chips of PMC,  
22 Alcatel's own products, Lucent's own products and we  
23 have the added complexity of the cross-talk between  
24 the advanced stage of the District Court litigation  
25 which is resulting in the evolving complaint that

1 you've had to deal with of terminating portions of  
2 this proceeding as the District Court's proceeded.

3 We have summary judgments, we're in the  
4 summary judgment process in the District Court. I  
5 suspect that will be narrowing this investigation  
6 materially.

7 JUDGE HARRIS: Summary judgment on what?

8 MR. REINES: We've requested of the District  
9 Court leave to file summary judgments on both the 633  
10 and 763 patents on multiple grounds. Now, that  
11 doesn't mean the District Court Judge is going to  
12 grant everything obviously, but --

13 JUDGE HARRIS: Multiple what?

14 MR. REINES: Multiple grounds. We have  
15 invalidity, noninfringement, there's an inventorship  
16 issue, there's other equitable things we've presented,  
17 so it's a full plate.

18 We don't know what the District Court is  
19 going to do and we're certainly not prognosticating  
20 about that, but I think we can all understand that  
21 between motions in front of the District Court, the  
22 continuing evidentiary record there, the witness  
23 testimony at trial in the District Court, that's going  
24 to be flooding into this Court.

25 It seems to us that it would be a big

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1 mistake for this Court to have a trial hearing in the  
2 very end of March which is now planned and then to  
3 have a decision period while we're getting verdicts,  
4 we're getting motions, we're getting witness  
5 testimony, positions, drop positions. It will be a  
6 mess for Your Honor as much as it will be a mess for  
7 all of us.

8 JUDGE HARRIS: Now, how firm is that  
9 April 16 trial date?

10 MR. REINES: Judge Sleet said that is built  
11 in stone and you're not going to want to be the one  
12 that comes in asking for any change of that at all.  
13 So no one, certainly Respondents, have no expectation  
14 at this point of seeking any change to that date at  
15 all. If there's one thing Judge Sleet made clear it's  
16 that that trial date will hold.

17 So the 18 month target date will allow this  
18 Court to have the benefit of the verdict --

19 JUDGE HARRIS: That's a jury case --

20 MR. REINES: It's a jury case. You're  
21 correct. Then whatever related narrowing of issues.  
22 We've already had a lot, but more is anticipated. It  
23 will just streamline this hearing in front of this  
24 Court in this unquestionably complex matter. So that  
25 was our reaction to this specific proposal which

1 otherwise would be fine to us other than the unusual  
2 circumstances here.

3 JUDGE HARRIS: All right. Mr. Otteson, did  
4 you want to?

5 MR. OTTESON: Well, Your Honor, PMC Sierra  
6 whom I represent is not a party in the District Court  
7 case, but I do note just looking at the schedule here  
8 that having a March 28 through April 6 trial in this  
9 Court means that the post-trial briefing for this  
10 investigation is going to run right into the beginning  
11 of that trial.

12 It seems to me to be a completely unworkable  
13 situation.

14 JUDGE HARRIS: One other thing. A couple of  
15 other things. In the discovery statement -- and any  
16 of the Respondents can address this -- you mentioned  
17 something about no domestic industry and no  
18 importation. I don't know which of you wants to  
19 handle that.

20 MR. REINES: Your Honor, I can just address  
21 briefly the domestic industry. We know a fair amount  
22 of Telcordia, but we obviously do not have that  
23 specific domestic industry issue in the District  
24 Court, so we don't have advanced discovery that we  
25 might.

1           It appears to us that there's a very strong  
2 case to be made, again, maybe that's more for one  
3 patent than the other, but that their licensing  
4 activity is so inconsistent and so nominal that it's  
5 not a situation like Tessera or one of these other  
6 companies that has a large licensing program that's  
7 been successful over time.

8           For the 763 patent as an example during its  
9 entire life, which is about to expire, but about 16  
10 year life they have one license for under \$200,000 --

11           MR. BRITTINGHAM: Your Honor, I'm sorry.  
12 I'm not sure that this is --

13           MR. REINES: I'm sorry. I apologize.

14           MR. BRITTINGHAM: -- public information and  
15 I understand there are client representatives in here  
16 as well, so I would ask either that Mr. Reines stay on  
17 the public record or that we go on the confidential.

18           MR. REINES: I apologize. I was attempting  
19 to respond. So there's a concern about the extent of  
20 licensing activity. That's really the main point. On  
21 the importation it's not clear what the allegations  
22 are as to what's being imported because this is a  
23 complex set of products.

24           You get many complex set of products, but  
25 there's integrated circuits, there's modules, there's



1 cards, there's entire switches and routers, different  
2 things are moving in different directions. It's not  
3 clear what is being alleged in that regard.

4 MR. OTTESON: Your Honor, if I just might  
5 add on the 763 patent the domestic industry for that  
6 we feel that may be an issue that may be ripe for an  
7 early summary determination motion. We would want to  
8 take some discovery, but I think that it is a serious  
9 issue with respect to domestic industry on the 763.

10 JUDGE HARRIS: All right. There's also  
11 mentioned -- well, let me ask Mr. Brittingham, what is  
12 your domestic industry going to be based on? Is it a  
13 licensing --

14 MR. BRITTINGHAM: Yes, Your Honor. It's a  
15 licensing domestic industry. We have a list of  
16 licensees that we have provided in the complaint, we  
17 have licensing revenue, we have personnel whose job is  
18 solely to license patents and frankly we think it is  
19 an issue that is ripe for summary judgment on our  
20 behalf, not on the Respondents.

21 JUDGE HARRIS: Are you aware of the order I  
22 issued on licensing as a basis for domestic industry?

23 MR. BRITTINGHAM: In the Tessera case or was  
24 there a more recent one?

25 JUDGE HARRIS: No. A very recent one.

1 MR. BRITTINGHAM: In Vioxx?

2 JUDGE HARRIS: I'm sorry?

3 MR. BRITTINGHAM: Was there an order in the

4 Vioxx case?

5 JUDGE HARRIS: Not in the Vioxx. Which one?

6 MR. PEDERSEN: Your Honor, the 553 case.

7 JUDGE HARRIS: Now, which product is that?

8 MR. PEDERSEN: Toshiba and Hynik I believe.

9 JUDGE HARRIS: Yes, yes.

10 MR. BRITTINGHAM: Yes.

11 JUDGE HARRIS: And the NAND case.

12 MR. PEDERSEN: Right.

13 MR. BRITTINGHAM: Yes. I'm aware of that

14 and it's a completely different situation.

15 JUDGE HARRIS: I mean, are Respondents'

16 counsel aware of it?

17 MR. CHERNY: I have not seen that decision.

18 From what Mr. Brittingham says it sounds like it is--

19 JUDGE HARRIS: Mr. Otteson, have you --

20 MR. OTTESON: No. I haven't read that yet,

21 Your Honor, but we'll get right on that. Believe me.

22 MR. BRITTINGHAM: Your Honor, I think the

23 reason I know about it is because I think our firm was

24 the alleged domestic industry in that case, but no.

25 This is a different situation.

1 I mean, frankly I think that the supposed  
2 licensing industry in that case is very different than  
3 what we have here where Telcordia is quite literally  
4 an entity that has patents that have been developed by  
5 its engineers and then has gone out and attempted to  
6 license those patents to make money just as a  
7 licensing industry want to do. We don't think there's  
8 really actually much controversy in that issue.

9 Also, on the importation issue I would say  
10 that we don't think there's much controversy there  
11 either. We do not know precisely what has been  
12 imported and when and where because that issue was not  
13 really fully developed in the District Court, but I  
14 think it's fair to say that there are a large number  
15 of imported components in the final product.

16 The final products as you may be aware are  
17 fairly large chassis with a number of boards inserted  
18 into them. Each board has anywhere from I don't know  
19 20 to 100 integrated circuits on it. I think final  
20 assembly probably at least our understanding is it is  
21 likely to occur in the United States, but a great deal  
22 of the internal components are made in various other  
23 locations.

24 So that information will be developed, but  
25 we think it's fair to say that there are a lot of

1 imports going on. I don't know whether you want me to  
2 respond to --

3 JUDGE HARRIS: Well, on licensing I just  
4 wanted to say as I tried to make clear in that order  
5 in a case that goes back a good ways, the Gremlins  
6 case, I found licensing as a basis for domestic  
7 industry before the statute was amended to provide it.  
8 The Commission reversed me saying that it wasn't  
9 provided for in the statute.

10 I was told by some of the people on the Hill  
11 later that one of the reasons that they changed the  
12 statute to include licensing was because of the  
13 Gremlins decision. When I issued this order in the  
14 NAND case I went back to try to find that legislative  
15 history, and I thought that somewhere in either some  
16 speech on the floor or a statement there was a  
17 statement to that affect in the legislative history,  
18 but I was never able to find it.

19 Nevertheless I think that was what happened,  
20 and I think that the Gremlins situation really is the  
21 kind of situation that was contemplated for licensing  
22 as a domestic industry, in other words where the  
23 business was in selling licenses to the intellectual  
24 property. Anyway this is just for the benefit. I  
25 suggest that everybody look at that order.

1 I've forgotten your name again.

2 MR. REINES: My name is Ed Reines on behalf  
3 of --

4 JUDGE HARRIS: Mr. Reines, so do you intend  
5 to file a motion to request an 18 month period rather  
6 than a 15 month?

7 MR. REINES: Yes, Your Honor. We thought  
8 that would make good sense. After discussing it here  
9 today I think that's what we'll do.

10 JUDGE HARRIS: All right. What is your  
11 position, Mr. Brittingham, on the 18 month target  
12 date?

13 MR. BRITTINGHAM: Well, Your Honor, we're  
14 obviously opposed to that. The parade of horrors  
15 that Mr. Reines described with two cases going  
16 simultaneously and maybe trials close to each other,  
17 it could have all been avoided if Mr. Reines' clients,  
18 Cisco and Lucent, had requested the stay that they had  
19 the absolute statutory right to.

20 Alcatel did and they won't be experiencing  
21 any of the difficulties that Cisco and Lucent now have  
22 basically doomed themselves to suffer. The statutory  
23 scheme is clear. It's the District Court that gets  
24 stayed, not the ITC. The ITC goes forward and ought  
25 to go forward and complete its investigation as the

1 statute states at the earliest practicable time.

2           It's our position that this 15 month  
3 schedule that you've set up is given the burdens that  
4 the ITC has, and the courtrooms and what have you the  
5 practical time that this case can be completed. Of  
6 course there may be ways to complete the investigation  
7 even earlier. Not every case goes to trial.

8           There are possibilities that the District  
9 Court case could go later. Not every District Court  
10 case goes to trial even when it is a firm date. There  
11 are issues in the District Court that will not be  
12 resolved in the trial that's currently scheduled in  
13 April. Things such as inequitable conduct are going  
14 to be heard later.

15           So that case is not just going to end on  
16 May 25 and then we all know the result. The stay was  
17 available, they chose not to and we feel that their  
18 decision -- why they did that we don't have any  
19 insight, but to then turn around and say because we  
20 didn't seek a stay it's going to be really complicated  
21 for us, Your Honor, and therefore we are entitled to a  
22 lengthy delay of a case that we have -- I mean,  
23 there's no question that 337 relief is different than  
24 District Court relief.

25           Exclusion orders cannot be issued by

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1 District Courts. I don't think that's really in  
2 dispute. There's no question that complainants often  
3 file simultaneously District Court complaints and 337  
4 complaints and it's hardly unusual for a 337 complaint  
5 to be filed months, sometimes years, after a District  
6 Court case has already been going on.

7           There's assorted reasons for that.  
8 Sometimes things just aren't going fast enough,  
9 sometimes new patents come out or new products come  
10 out. I mean, there could be any number of reasons and  
11 Mr. Anzalone has already explained some of the ones  
12 that led us to do it this way.

13           We feel that frankly the complicated nature  
14 of this case is one in large part of Lucent and  
15 Cisco's own doing. That they could have made it  
16 simpler on everybody by seeking the stay.

17           JUDGE HARRIS: All right.

18           MR. ANZALONE: Your Honor, let me just --

19           JUDGE HARRIS: Mr. Anzalone? Yes?

20           MR. ANZALONE: Your Honor, let me just  
21 respond since there was some discussion of motives and  
22 why things happen in the District Court. In this  
23 proceeding I hope I don't sink to the level of  
24 assigning motives to counsel, et cetera, et cetera,  
25 but I can confirm for you that the Markman decision in

1 the District Court did not come out until June 22  
2 which was fully a month after we filed the complaint  
3 in this case.

4 Now, as most parties believed we believed at  
5 that hearing that we would prevail. We prevailed on  
6 the principal claim construction issues on the 633  
7 patent and the 763 patent which is why we're going  
8 forward on those two patents. We lost on the  
9 principal claim construction issues on the 306 patent  
10 which is why we dropped the 306 patent from this  
11 investigation.

12 So as a result you have a pretty streamlined  
13 case here. We only have two claims we're asserting on  
14 the 633 patent and we have four claims we're asserting  
15 on the 763 patent. With respect to the District  
16 Court's schedule on September 16, 2006, there's going  
17 to be a teleconference before the District Court where  
18 the District Court will merely decide whether the  
19 parties are allowed to file summary judgment motions.

20 We are not allowed to file summary judgment  
21 motions until we have that teleconference, and at that  
22 teleconference Telcordia is going to be seeking the  
23 right to file summary judgment on the 633 validity and  
24 infringement issues. Two of the Respondents here are  
25 going to seek counter-rights and they're also moving



1 on the 763.

2 I just wanted you to be aware of the  
3 procedural schedule that all that's going to happen on  
4 September 16 is the District Court is going to decide  
5 whether in fact to even allow us to file summary  
6 judgment motions and if the Court thinks that there  
7 are disputed issues of material fact there won't even  
8 be summary judgment briefing in those cases.

9 JUDGE HARRIS: All right. Mr. Pedersen, is  
10 there any comments you wish to make on this?

11 MR. PEDERSEN: Your Honor, at this time any  
12 comments we have would be fairly preliminary in light  
13 of the motion practice that is about to come down the  
14 pipe, but the staff is somewhat sympathetic towards  
15 Respondents that they would be faced with two trials  
16 back to back and especially since the District Court  
17 case will be a jury verdict that there will be some  
18 resolution there at the end of that trial as opposed  
19 to a bench trial what could take many months.

20 Other comments that we might have at this  
21 time is a three month extension of the target date may  
22 not be necessary. A two month extension may cure the  
23 problems that could occur with the scheduling of both  
24 cases.

25 JUDGE HARRIS: You say a two month extension

1 might cure it?

2 MR. PEDERSEN: That's correct, Your Honor.

3 JUDGE HARRIS: All right. Well, first of  
4 all, Mr. Reines, do you have any idea of when you're  
5 going to be filing that motion?

6 MR. CHERNY: This is Mr. Cherny from Latham  
7 & Watkins. We just discussed it and we think we can  
8 get you a motion within two weeks on that point.

9 JUDGE HARRIS: All right. You've had an  
10 opportunity to see the draft procedural schedule?

11 MR. CHERNY: Yes.

12 JUDGE HARRIS: Are there any questions or  
13 comments with respect to that?

14 MR. CHERNY: Other than what we've just  
15 discussed I don't believe that we on this side have  
16 any issues.

17 JUDGE HARRIS: All right.

18 MR. BRITTINGHAM: Your Honor, obviously as a  
19 Complainant we would prefer an earlier trial, however  
20 I understand that courtroom availability may be an  
21 issue. In light of that there may be some  
22 justification for moving some of not the trial date,  
23 but some of the earlier leading up dates so that  
24 they're closer to the trial.

25 I note that the last item on the list of

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1 requirements of filing the staff's prehearing brief on  
2 February 23 and then it's more than a month before the  
3 trial begins. That's not that typical, although it's  
4 not impossible to deal with. It may be that the  
5 parties would take that available space and use it for  
6 some of the dates that lead up.

7 JUDGE HARRIS: For some what?

8 MR. BRITTINGHAM: For some of the dates that  
9 lead up to the trial so that there's less of a gap and  
10 more time to --

11 JUDGE HARRIS: There's a little  
12 miscommunication here. Are these the original dates  
13 that staff had? Everything leading up to the trial?

14 MR. PEDERSEN: That's correct, Your Honor.

15 JUDGE HARRIS: Well, I intended to advance  
16 those by three weeks. Just a little slip up here. So  
17 when we issue this we'll advance all those preliminary  
18 steps by three weeks or should it be two weeks?

19 MR. BRITTINGHAM: No, Your Honor. That  
20 sounds fine and that was what I was figuring would be  
21 appropriate.

22 MR. CHERNY: All we would say is obviously  
23 in the context of the motion we're going to bring  
24 regarding the ultimate trial date we will certainly  
25 keep in mind what you said in terms of the Court's

1 preference to keep a two to three week space in  
2 between the dates that are set here.

3 JUDGE HARRIS: Yes. I mean, this only  
4 applies given the 15 month target date. If that has  
5 changed after the briefing on the motion that you're  
6 going to file then we'll have different dates.

7 MR. CHERNY: Thank you, Your Honor.

8 JUDGE HARRIS: All right. Is there anything  
9 as to any count, anything else any counsel wants to  
10 bring up?

11 MR. SINDER: Your Honor, Stuart Sinder on  
12 behalf of Alcatel USA and Alcatel SA if I may. I  
13 think it might be worth informing Your Honor that  
14 there's sort of a very unusual issue that's going to  
15 come up in this case. It may be one that will turn  
16 out to be ripe for summary determination at a  
17 relatively early stage.

18 JUDGE HARRIS: Is that the standard setting?

19 MR. SINDER: Yes.

20 JUDGE HARRIS: As a matter of fact I noticed  
21 that in the papers and I intended to bring it up, but  
22 I forgot to. Yes. Can you identify which of the  
23 patents are part of the standard setting?

24 MR. SINDER: Yes. It's the 633 patent which  
25 is involved in that. It's been declared by the

1 Complainant, Telcordia, to be standards essential  
2 before the relevant standards organizations, meaning  
3 that their position, which the Respondents don't  
4 necessarily agree with, but their position is that if  
5 you practice the standard you definitely must come  
6 inside the scope of the patent.

7           There's a significant issue as to whether by  
8 doing that Telcordia has in effect waived or bargained  
9 away its right to have an exclusion order issued by  
10 the ITC. It's committed to those standards  
11 organizations that it will license everybody on fair,  
12 reasonable, nondiscriminatory terms.

13           In other words all the Respondents are  
14 entitled to be licensed. Now, there may be an issue  
15 as to what the license term should be, how much the  
16 amount should be, but that goes to the issue of  
17 damages which is in the purview of the District Court  
18 where Telcordia is already suing the Respondents who  
19 are allegedly making or selling the accused product.

20           In this forum the only relief that this  
21 forum can issue is an exclusion order and that's  
22 exactly what Telcordia gave away when it said this is  
23 standards essential and it would license everybody.  
24 Now, as far as I know, and Your Honor may know  
25 differently, we researched this a little, this may be

1 a question of first impressions before the Commission.

2 JUDGE HARRIS: I was about to say that, that  
3 I think it's a matter of first impression.

4 MR. SINDER: It's a legal issue, and I don't  
5 think there are any disputed facts that I am aware of  
6 that would go to this issue and it's a question that  
7 goes to the appropriate scope of relief that the  
8 Commission can issue in such a situation where a  
9 patent is alleged by the Complainant to be standards  
10 essential.

11 JUDGE HARRIS: So do you have the intention  
12 of filing a summary determination motion?

13 MR. SINDER: I believe we do. We haven't  
14 discussed what the appropriate timing for that would  
15 be yet, Your Honor, but I think that is something that  
16 would happen relatively early on.

17 JUDGE HARRIS: Mr. Anzalone?

18 MR. ANZALONE: Yes, Your Honor. Just a  
19 brief response on that. First in terms of disputed  
20 issues I don't believe any of the Respondents here  
21 have agreed that the patent claims at issue cover the  
22 standard because they're denying infringement, so we  
23 have a disputed issue right there.

24 Second with respect to the licensing of this  
25 patent the Respondents were offered the same license

1 deal that, well, many other companies were licensed,  
2 but they refused to take it.

3           In a case in which in the Commission a  
4 patentee offers a license and the respondents refuse  
5 to take it we do not have a situation where the  
6 standards issue should come up and in particular I'd  
7 like to point out that Alcatel had a subsidiary,  
8 Newbridge, which was actually licensed under this  
9 patent, failed to pay royalties, failed to submit  
10 royalty reports and then terminated the license.

11           So this is not a situation we believe which  
12 lends itself for summary determination. In fact to  
13 the extent that a license agreement or what the terms  
14 should be comes up at all it would be a remedy issue  
15 which would be part of a recommended determination by  
16 Your Honor, which would then be decided by the  
17 Commission as a whole as opposed to anything relating  
18 to a liability determination.

19           The status right now is none of the  
20 Respondents here have a license under the patent even  
21 though they were offered a license under reasonable  
22 and nondiscriminatory terms.

23           JUDGE HARRIS: All right. That's your  
24 position. I certainly understand it. Nevertheless I  
25 think there could be a legal issue here which I don't

1 think the Commission has addressed before that if  
2 infringement amounts to practicing the standard and  
3 you've agreed to license that on a reasonable royalty  
4 rate whether the Commission should or could issue a  
5 cease and desist order.

6 MR. ANZALONE: Your Honor, was that  
7 addressed in your decision in recordable optical  
8 disks? I believe that was also a situation where the  
9 patentee had a patent covering the standard, the  
10 respondent refused to pay and then there was --

11 JUDGE HARRIS: I know that I have taken  
12 certain aspects of the standards of before in other  
13 decisions, but I don't think I've ever handled it in  
14 as full a way as is being suggested. What did I  
15 decide in that one?

16 MR. BRITTINGHAM: Your Honor, Mr. Anzalone  
17 is referring to the Phillips case and that was  
18 obviously decided on other grounds --

19 JUDGE HARRIS: Yes, yes.

20 MR. BRITTINGHAM: -- so I'm not sure. I  
21 think my understanding or my review of prior cases is  
22 consistent with yours which is that the issue has come  
23 up from time to time, but has not been pushed all the  
24 way to a Commission decision at either the remedy  
25 stage or any other stage, but I may be wrong about



1 that as well.

2 JUDGE HARRIS: Well, I think that there was  
3 an issue in the Phillips case of practicing the  
4 patent, but there was the so-called orange book, but I  
5 don't think the relief suggested here was ever  
6 requested in that case and I think it went the issue  
7 was directed more to the anti-trust aspects, the  
8 patent pooling aspects of that decision.

9 So I don't think I've ever addressed fully  
10 what --

11 MR. BRITTINGHAM: Yes. Your Honor, I think  
12 in that case it may be the defense, I thought that the  
13 defense had been raised and your recommended  
14 determination was that had there been a violation  
15 there would have been a general exclusion order, but  
16 obviously we can all read it and figure out exactly  
17 what happened there.

18 JUDGE HARRIS: Well, I don't remember that.

19 Mr. Pedersen, do you have any comment?

20 MR. PEDERSEN: It's an interesting issue,  
21 Your Honor, and I think it will take some research on  
22 our behalf before I can provide Your Honor with any  
23 comments.

24 JUDGE HARRIS: All right.

25 MR. CHUBB: Your Honor, just one thing.

1 We've had cases where equitable estoppel was alleged.  
2 For example equitable estoppel by acquiescence and  
3 the industry practicing the patent. That would be the  
4 EE PROMS case, 395, and the Judge found equitable  
5 estoppel, but the Commission reversed. That had to do  
6 with a standard setting body, but it was a different  
7 issue from this licensing on reasonable terms.

8 JUDGE HARRIS: All right.

9 MR. SINDER: Your Honor, if I may. Stuart  
10 Sinder again. There is also an equitable estoppel  
11 issue in this case due to delay in asserting these  
12 patents which I believe is a separate issue from the  
13 one we're raising of standards essentiality.

14 Complainant can't have it both ways and on  
15 the one hand argue that its patent covers the standard  
16 and on the other hand say it wants an exclusion order  
17 which we believe it has either waived or bargained  
18 away, however you want to characterize it.

19 JUDGE HARRIS: Well, I think that this  
20 motion should be addressed as soon as possible. Do  
21 you need any discovery to do that?

22 MR. SINDER: I don't believe so, Your Honor.

23 MR. BRITTINGHAM: Your Honor, it would seem  
24 to us that at a minimum that would have to admit that  
25 their products are practicing the standard before it

1 is even a relevant issue to determine. We can't have  
2 it both ways, neither can they. They can't be  
3 noninfringing, but also entitled to at worst a  
4 reasonable and nondiscriminatory royalty that they  
5 apparently --

6 JUDGE HARRIS: Well, they might be able to  
7 say hypothetically assuming it does that the law would  
8 apply. I don't think we'd have to require them to  
9 admit infringement.

10 MR. SINDER: Your Honor?

11 JUDGE HARRIS: Yes?

12 MR. SINDER: That's correct, Your Honor.

13 Either hypothetical the result is the same. If we're  
14 not infringing there can't be an exclusion order and  
15 if we're within the scope of the patent which they say  
16 covers the standard then that raises the legal issue  
17 of whether the Commission can appropriately issue an  
18 exclusion order under those circumstances.

19 So I disagree with Mr. Brittingham about the  
20 admission.

21 JUDGE HARRIS: All right.

22 MR. SINDER: Your Honor, may I just in case  
23 the Court isn't aware just circling back for a moment  
24 on the pending motion by Alcatel SA to terminate the  
25 investigation we did file a request for leave to file

1 a reply brief which we have submitted with that  
2 request so it responds to some of the arguments that  
3 have been presented here by the staff.

4 It responds to the staff's submission as  
5 well as the responding brief on behalf of Complainant.  
6 We think our position is spelled out fairly well in  
7 those papers and unless Your Honor wants to hear  
8 further on that we rely on that.

9 JUDGE HARRIS: Yes. I don't know. I'm not  
10 promising you a ruling by any particular date, but I  
11 will examine the motion, and the responses and just  
12 rule on it as soon as I can.

13 MR. SINDER: Thank you.

14 JUDGE HARRIS: Anything else?

15 (No response.)

16 JUDGE HARRIS: All right. There being  
17 nothing from any counsel this conference is closed.  
18 Thank you.

19 ALL: Thank you, Your Honor.

20 (Whereupon, at 3:08 p.m., the preliminary  
21 conference in the above-entitled matter was  
22 concluded.)

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24 //

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**CERTIFICATION OF TRANSCRIPTION**

**TITLE:** Certain Equipment for  
Telecommunications or Data

**INVESTIGATION NO.:** 337-TA-574

**HEARING DATE:** August 16, 2006

**LOCATION:** Washington, D.C.

**NATURE OF HEARING:** Preliminary Conference

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceeding(s) of the U.S. International Trade Commission.

**DATE:** August 16, 2006

**SIGNED:** LaShonne Robinson  
Signature of the Contractor or the  
Authorized Contractor's Representative  
1220 L Street, N.W. - Suite 600  
Washington, D.C. 20005

I hereby certify that I am not the Court Reporter and that I have proofread the above-referenced transcript of the proceeding(s) of the U.S. International Trade Commission, against the aforementioned Court Reporter's notes and recordings, for accuracy in transcription in the spelling, hyphenation, punctuation and speaker-identification, and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceeding(s).

**SIGNED:** Carlos Gamez  
Signature of Proofreader

I hereby certify that I reported the above-referenced proceeding(s) of the U.S. International Trade Commission and caused to be prepared from my tapes and notes of the proceedings a true, correct and complete verbatim recording of the proceeding(s).

**SIGNED:** Tammy Brodsky  
Signature of Court Reporter